

# Lost in operationalisation:

## Developing legally relevant indicators, questions and benchmarks

Dr Hadi Strømme Lile

*Faculty of Health and Social Studies, Østfold University College, Fredrikstad, Norway*

Email: [hadi.s.lile@hiiof.no](mailto:hadi.s.lile@hiiof.no), mobile: +47 91592963

Dr Hadi Strømme Lile is an associate professor at Østfold University College in Norway. He got his PhD from the law faculty at the University of Oslo. He has been teaching sociology of law and human rights law for many years. He has been an advisor for the Gáldu – The Resource Centre for the Rights of Indigenous Peoples and a senior advisor for Save the Children Norway. He is the chief editor of the journal Critical Law (Kritisk juss) in Norway.

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## Lost in operationalisation:

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The main purpose of this paper is to provide methodological guidance to students and researchers conducting quantitative studies on the realisation (outcome) of human rights law. The paper focuses on the grey area between law and sociology. How to ensure a high score on legal relevance in quantitative socio-legal studies on the realisation of human rights law. To discuss, this two disciplinary traditions are merged – sociology of law and human rights research on indicators and benchmarks. A key tool for making legally relevant questions in surveys are *indicators*. *Benchmarks* are also important for some provisions to determine if an obligation has been fulfilled by the State. The process of translating the law to indicators, questions and benchmarks is called operationalisation. Each operationalisation process must aim for a high score on legal relevance and it should be transparent and open to criticism. To first spend a lot of time and money on surveys and data collection, and then to miss the law one is pretending to measuring is not just embarrassing, but hazardous to the protection of human rights, because people then have a tendency to rationalize and present alternative facts about the law.

Key words: *operationalisation; indicators; surveys; validity; sociology of law*

## 1. Introduction

Dr. Martin Luther King wrote in 1967 that:

The ubiquitous discrimination in his daily life tells him that laws on paper, no matter how imposing their terms, will not guarantee that he will live in 'the masterpiece of civilization'. [...] Laws that affect the whole population – draft laws, income-tax laws – manage to work even though they may be unpopular; but laws passed for Negro's benefit are so widely unenforced that it is a mockery to call them laws.<sup>1</sup>

Usually, it is the most marginalised members of society that suffer from a lack of real legal protection. A law that does not work is like a banknote without value. To bridge the gap between law on paper and 'living law' one needs to develop good socio-legal methods to study the impact of law.<sup>2</sup> Statistical research data on the realization of a number of human rights laws is a human right in itself. Article 31 of the UN Convention on the Rights of Persons with Disability (CRPD) asserts that States Parties must: *'[...] undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention.'* The Committee on Economic, Social and Cultural Rights (CtESCR)<sup>3</sup> and the Committee on the Rights of the Child (CtRC)<sup>4</sup> have both asserted that States should adopt indicators and benchmarks to measure quantitatively the effects of the conventions within their jurisdiction.<sup>5</sup>

### 1.1 Research Question

In 2008, Hans-Otto Sano and Hatla Thelle made a statistical analysis of all the references in the journals Human Rights Quarterly and Netherlands Quarterly of Human Rights between 2005 and 2007. In their study, they revealed significant gaps in terms of the research material included in the articles. They concluded that:

It appears that on average 46% of the sources for scholarly articles in the quoted journals during these three years were respectively organisational reports, administrative or legal documents while on average 45% of the references quoted were secondary literature. The remaining references (9%) were almost equally distributed between quasi-legal and internet sources. Virtually none fall into our category of quantitative or qualitative data.<sup>6</sup>

Only 0.1 % of the references in 2005 and 2007 could be categorised as “quantitative data”, which included a ‘staggering’ three references.<sup>7</sup> In 2006 there were no references at all in this category. As for qualitative data there were four references in 2005 (0.2%), in 2006 there were two references (0.1 %) and in 2007 there was leap to 1.5% meaning 26 qualitative references.<sup>8</sup> This was ten years ago, and things have changed since then.

In an article summing up human rights research, Fond Coomans, Fred Grünfeld and Menno T. Kamminga claimed that there is a lack of methodological rigour in human rights research, and that researchers tend more often to be activists than scholarly. They were not very optimistic about the future, and concluded that:

Unfortunately genuine, high quality interdisciplinary research is rare because few researchers are fully qualified in more than one discipline. In our view, it is generally best for researchers to work within their own disciplines and not to moonlight in other domains.<sup>9</sup>

This is a rather pessimistic conclusion, and given the fact that quantitative research on the realization of human rights are a human rights obligation, researchers should step up and try to ‘moonlight’ across disciplinary boundaries. This article is about how to do that, while maintaining high quality legal relevance at every step of the way.

The main question of this article is: *How do we ensure a high score on legal relevance (validity) in quantitative studies on the realisation (outcome) of human rights law?* A key tool for bridging the gap between the law and the questions is the development of indicators. An indicator, as defined in this paper, is supposed to be tool to measure the law – an operationalisation (translation) of the law. I am mainly concerned about the development of outcome indicators, meaning indicators on the actual manifestation of the law for individuals and groups.<sup>10</sup> Based on the indicators, one can develop survey questions. In addition, there is the question of how to determine the minimum score (result) on indicators and questions to make a judgment on whether a State has fulfilled its obligations: namely, how to develop *benchmarks*.

The process of translating law into indicators, questions and benchmarks is called the *operationalisation* of the law. The text of the law is operationalised to measurable indicators; the indicators are operationalised to questions; and, based on these questions, one can operationalise benchmarks. See the illustration below:

The Law ➡ Indicator ➡ Questions ➡ Benchmarks

At each stage of the operationalisation-process, there is a danger of making mistakes, and one moves further and further away from the text of the law. So how do we ensure the highest score on legal relevance at each step – in the operationalisation of indicators, the questions we ask and the benchmarks we set, based on the human rights law we claim to be measuring?

The main purpose of this paper is to provide methodological guidance (or at least a contribution to the discussion of this) to students and researchers conducting quantitative studies on the realisation (outcome) of human rights law. The paper focuses on the ‘grey’ area between law and sociology: it is concerned with how that gap can be bridged. Once the crossover has been made, students and researchers may then refer to the vast literature on sociological methodology. I will also provide some criticism on the lack of diligence of international organisations and colleagues in how they reason around the operationalisation of indicators, questions and benchmarks.

## ***1.2 Human Rights Focus***

What human rights laws are most relevant for a quantitative socio-legal study concerning their realisation? For some human rights provisions, quantitative studies are necessary to determine if a government has met its obligations of results.<sup>11</sup>

In my Ph.D., I tried to find out if Norwegian children learn what they are supposed to according to the Convention on the Rights of the Child (CRC) article 29 (1).<sup>12</sup> This is a provision on the content of education, and I wanted to know if the provision had been fulfilled in Norway. Since different children have different capacities for learning, it was essential to collect statistical outcome data to find out if a sufficient proportion of children, at a certain level (9<sup>th</sup> grade), had actually learned the minimum required under the convention. Before I could start to collect data, and to design surveys for children and teachers, I had to establish (legally) what the children were supposed to learn. To set benchmarks, I had to determine what should be expected, at a minimum level, for the CRC article 29 (1) to be realized. If 90 percent of the children after nine years of education cannot read or write, then obviously the quality of education, defined by its minimum standards in CRC article 29 (1), has not been realised. However, where should one draw the line?

There are many other human rights provisions that would require similar research in order to determine if the law has been fulfilled. For instance, the Convention on the Elimination of Discrimination Against Women (CEDAW) article 5 (b) provides that governments shall take all appropriate measures to ensure that:

Family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

So - how large should the proportion of families be that are able to express the proper minimum understanding required? What is an acceptable result? At what level is it safe to say that the convention has not been fulfilled?

Then, there are provisions in which one can determine a violation on a case-to-case basis, but one might suspect that a large proportion of the affected group does not have the resources to claim those rights. If statistics show that the law is not working for many people, it becomes clear that the State should actively do more to fulfil it. Many aspects of the discussions in this paper will be relevant for studies on this latter category of human rights studies, but as a whole the paper will be most relevant for provisions in which the outcome of quantitative studies are necessary to determine if the state has met its obligations of results.

### ***1.3 Scientific Platform***

This paper will be based on the merging of two disciplinary traditions: 1. the branch within sociology of law focused on the study of the effects of laws; and, 2. the discussion on human rights indicators and benchmarks. The discourse within the sociology of law concerning the study of the effects of laws has mainly been concentrated on domestic legislation, and has largely been separate from the debate about human rights indicators and benchmarks. I will start by introducing the sociology of law, before I start talking about indicators and benchmarks.

## 2. Sociology of Law

According to Thomas Mathiesen, the sociology of law concerns itself with the description or analysis of the law in society.<sup>13</sup> Some say that the sociology of law is a branch of sociology; that is to say, the branch of sociology that is occupied with legal issues.<sup>14</sup> Others say that the sociology of law is part of the discipline of law.<sup>15</sup> Still others have argued that the sociology of law must find its own autonomous identity, detached from the disciplines of both law and sociology.<sup>16</sup> Kristian Andenæs asserts that we should not put ourselves in a position in which the disciplines determine our research questions: *'It is the real questions, the real problems of humanity that should determine our approaches and methods – not the other way around.'*<sup>17</sup> The sociology of law is a science dedicated to the study of questions that fall in-between law and sociology - pure and simple.

### 2.1 The Study of The Housemaid Act

One of the classic studies of sociology of law was published in 1952. Wilhelm Aubert, Torstein Eckhoff and Knut Sveri published a study on the realization of the Norwegian Housemaid Act.<sup>18</sup> A central aim of the study was not to simply study the realization of the Norwegian Housemaid Act; they wanted to say something general about how to study the effects of laws.<sup>19</sup> The study was ground-breaking, at least in Scandinavia, and has inspired many other studies.<sup>20</sup> However, not many scholars have discussed its methodological approach and importance.

In this study, a key methodological challenge was, according to the authors: *'[T]o decompose the complicated and accurate information we needed (since the law is detailed and complicated as most laws) in short and simple questions that the interviewer and interviewee could master.'*<sup>21</sup> However, although they identified this key challenge, they did not really provide any tangible solutions. Instead, they said that:

We were largely looking for information on the actual conditions and often knew exactly which properties this information should have. It should primarily cover all the characteristics that determine whether there is any breach of the law or not.<sup>22</sup>

How could they just know this? Where did this intuitive knowledge come from? According to the authors the questions of their survey was based on the “text of the law” (The

Housemaid Act).<sup>23</sup> However, sometimes one has to actively interpret the law, and not just rely on intuition.

In the end, despite the fact that Aubert, Eckhoff and Sveri wanted to say something general about how to study the effects of laws, it seems they did not have a plan, and nor did they even discuss the need for one. According to Jørgen-Dalberg Larsen, the lack of general theories on how to study the effects of laws is a significant problem within the sociology of law.<sup>24</sup>

### 3. Making a Plan

How do we best approach bridging the gap between the law and the questions we ask in surveys and interviews? Firstly, it is essential to get all the factors ‘on the table’. The most common mistake is to start constructing questions before the law has been sufficiently analysed and defined, and before the necessary decisions on the selection of informants and the methods of how to collect the data have been taken. It is hard to break free from a detailed starting point. According to Gustav Haraldsen: *‘Those who start making questions will easily stick to formulations whether they cover the research question or not. Such surveys will easily become messy because the questions are not based on an overall plan.’*<sup>25</sup>

#### 3.1 Evaluation Models

How does one make a plan? In 1997, Sidsel Sverdrup wrote a Ph.D. in which she criticised existing sociology of law studies for lacking theories on methodological models in studies about the effects of laws. She suggested three models on how to evaluate laws.<sup>26</sup>

Subsequently, she refined and reiterated these models in her latest book on evaluations: *the legal evaluation model, the target group model and the context based model.*<sup>27</sup>

*The legal evaluation model* is an evaluation model based on the analysis of legal complaints and legal cases. The downside to this is that, in many situations, the number of cases is not necessarily that high.<sup>28</sup> One might also argue that those who complain to courts and legal institutions are often amongst the most resourceful within society, and not the most marginalised.



*The context based evaluation model* focuses on informants not directly affected by the law, but indirectly affected. In this model, one tries to collect data on the framework conditions of the law.<sup>29</sup>

*The target group evaluation model* is focused on the target groups affected by the law. Based on indicators, one collects data through interviews, surveys and/or observations from those directly affected by the law.<sup>30</sup>

The target group model and the context-based model are the most relevant for a study on the realization of those human rights provisions, which is the focus of this paper.<sup>31</sup> When undertaking a survey, one might wish to compare information from different perspectives, meaning that one puts more or less the same question to different informants (both the target groups and those indirectly affected by the law). This is called triangulation.<sup>32</sup> Michael Evans explained that:

[...] based on the principle of confirming findings through the use of multiple perspectives. The key aspect of the strategy is threats to the validity of the conclusions, caused by the particular biases of any one source, method or agent of research, and which will be lessened by employing a variety of type. [...] The converging perspectives will arguably make the findings more powerful.<sup>33</sup>

Although the models of Sidsel Sverdrup address certain aspects of where to collect information about the law, they do not include much on how to make sure that the questions asked of the target group or other informants are as legally relevant as possible.

Todd Landman and Edzia Carvalho (2010) considered four measurement models of human rights: events-based measures, standard-based measures, survey-based measures and socio-economic and administrative statistics.<sup>34</sup> For the purpose of this paper, *Survey-based measures* are the most relevant.<sup>35</sup> *Survey-based measures* are, according to Landman and Carvalho, based on collecting information from a large sample of individuals (usually randomly selected) who answer predefined questions about either their *perception of human rights* or their *experiences of human rights* within their country.<sup>36</sup> I am not sure why Landman and Carvalho seemed to think that surveys on the realization of human rights must be about the *perception or experiences* of human rights. People in general do not necessarily know much about human rights law, and are thus not necessarily able to say anything meaningful about it.<sup>37</sup> Landman and Carvalho included a short discussion on the

development of indicators as tools to operationalise human rights to questions in the surveys.<sup>38</sup>

Indicators, the questions based on them, and benchmarks, should have a high score on legal relevance (validity). Before I start to talk about indicators, I will, therefore, first address the importance of legal relevance (validity).

#### 4. Validity/ Legal Relevance

The difference between the actual values of the law, and the operationalised values, is called *the measurement error margin*.<sup>39</sup> In order to increase validity, one must make sure that the measurement error margin is as low as possible. If one regards human rights as legal provisions of law the indicators, questions and benchmarks must be as legally relevant as possible. Notice that I do not say legally “valid”. It is difficult to talk about “legal validity” in this context, since that is a concept of law that indicates the enforceability of a law. For a law to become a legal law, it has to be legally valid.<sup>40</sup> Thus, not to confuse, one should talk about making indicators *legally relevant*.

Investing time, money and energy on conducting surveys, only to find out subsequently that the questions were off-target, is a disaster. What might happen then is that instead of admitting that one is off-target, those who have a vested interest in the data start pretending that the law is different. The indicators and benchmarks might then take a normative life of their own, reshaping its “parent” norm.<sup>41</sup> Terence Halliday emphasise that:

Indicators themselves are permeated by the exercise of power—in their creation, their propagation, and their impact. If social indicators are the creatures of social scientists, they must also be subject to the same sorts of scrutiny they purport to exemplify.<sup>42</sup>

Halliday argues that an implicit, and sometimes explicit, epistemological tension among professions within international financial institutions impels their legal departments to diagnose national legal systems with technologies drawn more from the social sciences and finance than law.<sup>43</sup> Indicators are supposed to measure the law, not to hijack and change it.

Malcolm Langford and Sakiko Fukuda-Parr (2012) identifies validity<sup>44</sup> as the “Achilles heel” of indicators, asserting that:

The first (challenge) is the definition and choice of indicators – construct validity. The very strengths of quantification – simplification and abstraction in applying a single measurable definition across different contexts – are its Achilles heel. The criteria for creating an indicator may not match the relevant human rights standard.<sup>45</sup>

Landman and Carvalho discuss a few aspects of survey design, stating that:

Any questions that probe an individual's experience or perception of human rights needs to pay attention to significant questions of validity. First, does the question (or questions) have what is called 'face validity', which is to say, does the question adequately capture the meaning of the particular human right 'on the face of it'? Second, does the question (or questions) have content validity, where all dimensions of the human right are covered by the questions? Third, does the question (or questions) achieve internal validity, where responses across batteries of related questions on the human right are logically consistent? Finally, does the question (or questions) provide for external validity, where responses simply appear to contradict other known information about the respondent? <sup>46</sup>

I do not agree with the premise of this argument - i.e., that a survey on the measurement of the realization of human rights need to address the '*experience or perception of human rights*'.<sup>47</sup> However, we must strive for surveys to have high scores on face validity, content validity, internal validity and external validity. Landman and Carvalho talked about the concept of human rights in general, but they did not offer any advice on how to develop indicators, benchmarks and questions that can protect and ensure a high score on legal relevance.<sup>48</sup>

#### **4.1 What is Human Rights Law?**

As mentioned, this paper is not on the realization of the concept of human rights in all its possible meanings. I am only concerned about the realization of human rights as law. What is human rights law? That is ultimately a question of legal methodology and jurisprudence.

Todd Landman claimed that: '*Rights in practice are those rights actually enjoyed and exercised by groups and individuals regardless of the formal commitments made by governments.*'<sup>49</sup> He seemed to be suggesting that some rights exist beyond political agreements and commitments; and, further, that these are the "real" rights. Eugene Ehrlich

(1862-1922) was one of the founding fathers of the sociology of law. He talked about the “living law”, which is ‘[...] *the law which dominates life itself even though it has not been posited in legal propositions*’.<sup>50</sup> However, if this were the case, what would be the difference between *legal* norms and other norms, and how would the norms of one group affect the norms held dear in other associations?<sup>51</sup> In my experience, as one who has worked on indigenous peoples rights for many years, human rights violations often occur because a large proportion of the majority regard their own norms as more important than the legal norms of human rights conventions. Minority and indigenous peoples’ legal rights are ignored, distorted or successfully opposed, partly because the voices of the minorities are drowned, ignored or rendered insignificant in the public debate by the majority – because they are not seen as being important. Issues, on the other hand, involving minorities or indigenous peoples doing something perceived to be violating the norms of the majority are given massive attention. Thus, I do not regard the rationality of human beings to be trustworthy in questions of rights, morals and justice. According to Gordon Allport:

Open-mindedness is considered to be a virtue. But strictly speaking, it cannot occur. A new experience must be redacted into old categories. We cannot handle each event freshly in its own right.<sup>52</sup>

Hans-Georg Gadamer argued that:

Is not, rather, all human existence, even the freest, limited and qualified in various ways? If this is true, the idea of an absolute reason is not a possibility for historical humanity. Reason exist for us only in concrete, historical terms – i.e., it is not its own master but remains constantly dependent on the given circumstances in which it operates.<sup>53</sup>

Even Immanuel Kant admitted that actions based on a purely rational good will, free from self-love (inclinations), are rare things, ‘*which the world has perhaps so far given no example*’.<sup>54</sup>

One of the oldest and most fundamental philosophical debates of jurisprudence is whether there is a difference between law and justice. Are human rights laws inherently just? *Natural law* perspectives are inclined to “find” justice in law, suggesting that theories of justice should guide the interpretation of law. Legal positivists would argue that laws are

man-made, and that in order to understand the law, one must distinguish between what ‘is’ and what ‘ought to be’.<sup>55</sup>

As I do not trust the rationality of human beings, I find it important to cling to the technical rigidity of interpreting valid legal sources. Thus, I am a legal positivist. As I see it, conventions are contracts between the States. The law is what the contracting parties define it to be. Human rights laws are man-made political compromises, in an unfair world (here, “unfair” is defined according to my own subjective norms, which have nothing to do with the law). Human rights law is not based on the highest moral principles of morality; it is the set of agreements left when the negotiations are over: the compromises of a broken world. The road to hell is paved with good intentions – that is why nations choose to cling to this compromised “lesser” peace. The alternative is an international “State of Nature”.<sup>56</sup>

In a socio-legal study on the effects of law, the main purpose is rarely to discuss legal methodology as such. Adopting a controversial approach to legal interpretation is thus counter-productive. To ensure a high score on legal relevance in indicators, questions and benchmarks, one should adopt an approach to the law that is the most likely to prevail in court. In most courts, adopting a legal positivist approach is the safest. Legal positivism is the legal canon, and any explicit deviation from it would likely be met with the criticism of judicial activism. As the legal canon, and the method socially expected and legitimately justified, positivism would be the safest choice to avoid methodological criticism in most countries.<sup>57</sup> I am not saying that legal positivism is the only approach to human rights law, but if one wants to question it and argue the case for a natural law theory, then that should be done separately. In order to increase legal relevance, one should adopt the safest possible approach to the law.

## 5. Indicators, Questions and Benchmarks

Indicators are key tools to ensure a high score on legal relevance in the survey questions. Human rights indicators can be defined as: *‘[A] piece of information used in measuring the extent to which a legal right is being fulfilled or enjoyed in a given situation.’*<sup>58</sup> This approximates what I mean when I talk about indicators in this paper.<sup>59</sup> For the purpose of this paper, I will define it more specifically as: *A legal conclusion about what to measure in order to say that a legal right is fulfilled in a given context.*

Why do I define human rights indicators as legal conclusions? Because, in this paper, I am concerned about how to ensure legal relevance in studies of human rights as law. I do

not focus on human rights as political instruments or moral guidelines; I do not focus on Sustainable Development Goals or human development indexes. I am interested purely in the study of human rights as legal commitments made by legislative bodies. In many countries, a range of human rights commitments are treated merely as political or moral guidelines, but often enough, legislators do make commitments to certain human rights obligations by either incorporating or transforming conventions into law. Then it is up to the executive branch to realize those commitments, and it is our job as researchers to test the successfulness of those efforts. In this paper, I am strictly interested in such studies, measuring the effectiveness of the government in delivering on legislative commitments made by the legislator. The legal analysis of human rights as law, in the sense of commitments made by the legislators, must include both an analysis of the domestic law, meaning determining the strength of the commitments, and an analysis of the content of those commitments, which (unless we are talking about domestic human rights provisions) must involve the interpretation of international law.

Most of the literature on human rights indicators is not concerned about human rights as law; at least, not in the sense of legal commitments made by legislators. However, if one is concerned with measuring the realisation of human rights commitments as law, then indicators, as tools for measuring these legal commitments, must be as legally relevant (valid) as possible.<sup>60</sup> Thus, human rights indicators (as I define them) are legal conclusions that must be justified by legal arguments. The legal analysis behind the operationalisation and justification of the indicators should also be transparent, and open to criticism. They should not just appear ‘magically’, as if out of thin air. In addition, there is the question of judiciability.<sup>61</sup>

In 2003, the UN Special rapporteur on the Right to Health, Paul Hunt, proposed a conceptual framework for using and creating indicators in relation to the right to health.<sup>62</sup> The framework is based on three types of indicators – structural-, process- and outcome indicators. The Office of the High Commissioner for Human Rights (OHCHR) later adopted this framework in a general project on human rights indicators.<sup>63</sup>

*The structural indicators* capture the *commitment* of the State. They reflect the legal instruments and existence of basic institutional mechanisms deemed necessary for facilitating the realization of a human right.<sup>64</sup> Notice that in addition to the legal weight and nature of the commitment, it includes institutions - for instance, the existence of a National Human Rights Institution that has a mandate in conformity with the Paris Principles.<sup>65</sup>

*Process indicators* measure the processes by which the laws are implemented and realized – the duty bearers' (government's) ongoing efforts to transform their commitments into the desired results. They measure the *willingness* of States to realise human rights commitments, the degree to which activities that are necessary to attain the objectives of the law are carried out, and the progress of those activities over time.<sup>66</sup>

*Outcome indicators* measure the *capacity* of states to deliver results. They are designed to capture data on the actual enjoyment of human rights for individuals and groups.<sup>67</sup>

### 5.1 SMART-Criteria

It is often asserted that indicators should be SMART. It is mentioned so often that I feel compelled to address it. The letters of SMART can mean different things. In general, SMART often means something like this:

S: Specific or significant

M: Measurable

A: Attainable or acceptable

R: Relevant or realistic

T: Time-framed or trackable

Not all of these quality criteria on indicators are that useful for a study on the realization of a convention. Indicators are used as tools to plan and evaluate development projects. Criteria such as *attainable* and *realistic* are only relevant for such project-indicators. If one strip away this irrelevant noise around the SMART-criteria, we end up with three main criteria: *specific*, *measurable* and *valid* (relevant).<sup>68</sup> In addition to these, Andersen and Sano (2006) discussed a range of other criteria.<sup>69</sup> The most relevant one is that indicators should be focused on *target groups*. In order to conduct a sociological study, one must define who to get information from (i.e., the informants). They might be defined as the target group. Another way of approaching this is to say that the target groups are those directly affected by the law or the right holders. As mentioned above, that is not necessarily an absolute criterion; one might instead collect information from those indirectly affected by the law.<sup>70</sup>

It might also be helpful to narrow the study to some specific geographical regions, and maybe to a specific target group within that region.

Based on this, an indicator that is relevant for socio-legal studies on the realisation of human rights law is *a concrete, measurable and legally relevant conclusions that identifies a specific group of informants within a defined geographical area.*

## 5.2 Reddy Made Global Indicators

UNHCR has produced a list of general human rights indicators.<sup>71</sup> A range of other organisations has done the same thing. UNICEF has developed one of the best lists of global indicators. They have produced a handbook on the interpretation and implementation of the Convention on the Rights of the Child (CRC). In the handbook, a whole chapter is dedicated to each of the articles in the convention. At the end of each of these chapters, there are lists of indicators.<sup>72</sup> The question therefore arises: how useful are these general global indicators?

Katarina Tomaševski argued that:

Applying the same standard of performance to all countries as if all had identical infrastructures, institutions and resources is not only unfair to those countries where a national human rights system has yet to be developed, but it also disregards one of the main targets of international cooperation in the area of human rights, namely to promote human rights.<sup>73</sup>

One should make indicators as relevant to the context as possible; only then will they be legally relevant. However, an even bigger problem is that the legal analysis of these global indicators is not visible. Although UNICEF provides a legal analysis of each of the articles of the CRC, and ties the indicators to that legal analysis (which is why I say they are one of the best) they do not provide a legal justification for each of the indicators. They do not discuss the legal relevance of the indicators at all. They are simply listed at the end of each chapter, as if they were a natural conclusion to the general legal analysis.<sup>74</sup> The OHCHR is even more general, and there is practically no legal justification for the indicators proposed at all.<sup>75</sup>

As mentioned, indicators should be regarded as legal conclusions:<sup>76</sup> they are instruments of power, and the operationalisation of them should be transparent and open to



discussion.<sup>77</sup> Any legal conclusion must be justified by legal arguments and those arguments should be presented and discussed openly.

### 5.3 Survey Questions

In theory, survey-questions are developed on the basis of the indicators that one has operationalised from the law; in other words, the questions are operationalised from the indicators. The indicators can function as sociological research questions, and one might feel tempted to ignore the law at this point, focusing only on the indicators. This would be a mistake. To a certain extent, each operationalisation process is like solving a Rubik's Cube – once you have one part finished, you have to mix up everything in order to get the second part correct. It is not quite as frustrating as a Rubik's Cube, but in order to secure a high score on legal relevance, one must at least keep an eye at the legal analysis behind the indicator.

A sensible tradition within quantitative research is that surveys build on each other. A good survey contains questions similar to previous surveys, so that the results of one survey can be analysed in comparison to those obtained in previous surveys.<sup>78</sup> If one is developing a survey together with a quantitative scholar, they will certainly want to design the survey in relation to other studies. Thus, sometimes one ends up in a discussion about what is most important. If legal relevance is the primary aim of the questions, then questions of former surveys poses a dangerous temptation. It is indeed convenient if some questions in other surveys can be regarded as legally relevant, but one should make sure to justify them in relation to one of the operationalised indicators.

Some questions will be more legally relevant, and therefore fit better to the indicator and the law. In order to maintain a high score on legal relevance, one should discuss the relevance of each question. This might become a question of space, but one might at least consider discussing the legal relevance of some of the questions that does not have an intuitive and obvious legal relevance to the indicator and the law.

In addition to questions about the actual realisation of the law, it often natural to also include other context based questions that can say something about the realisation of the law. This might include for instance knowledge about the law.<sup>79</sup>

## 5.4 Benchmarks

Having made outcome indicators and questions one come to this question: what should be the minimum score/result on the indicators to determine that a State has fulfilled its commitments? That is the benchmark. As indicated earlier, the CtESCR and the CtRC have emphasised that states should adopt benchmarks in relation to each national indicator.<sup>80</sup> However, for instance in the report of Canada, indicators are mentioned - but not benchmarks - and the indicators are not justified by any legal analysis.<sup>81</sup> Benchmarks should also be justified in relation to the law, and the arguments should be transparent and open to criticism.

It is very difficult to arrive at any accurate benchmark for outcome indicators. Often there are quite different views on the law and to arrive at a measurable minimum score, representing a violation of the covenant, is quite a challenge.<sup>82</sup> Benchmarks are based on the numbers (data) one can expect from the questions of surveys. At this stage, the text of the law is operationalised (translated) for the third time. The text of the law is operationalised to measurable indicators; the indicators are operationalised to questions, and based on the questions one are supposed to draft legally relevant benchmarks.

The operationalisation of benchmarks must also be analysed in the light of the legal discussions on progressive realisation and minimum core rights.<sup>83</sup> The CtESCR have adopted “scoping”, which involves the joint consideration by the State and the Committee of national benchmarks, which will provide the targets to be achieved during the next reporting period.<sup>84</sup> If the State and the Committee have agreed on a benchmark, one might say that this constitutes a commitment by the State - hence, a law. One might then use that benchmark, or the principal arguments involved in setting that benchmark in order to find a benchmark. To be more or less sure to hit the law, one might simply adopt the same indicators and benchmarks that have already been agreed by the State and the Committee. However, the point of doing studies on human rights must be, at least sometimes, to put a focus on issues ignored by the State and the Committees. If the benchmark is set low enough and embedded in strong legally relevant arguments, the political leadership might feel ashamed to challenge it. After all, the politics of shame and blame might be the most salient feature of the power of human rights.<sup>85</sup>

Although the benchmarks should be drafted after the questions, the benchmark score does not need to be based on each individual question. Answers from different questions can be added together to give a sum-score on an indicator. When I did my Ph.D., one of my

indicators was formulated approximately like this: *'Pupils in ninth grade must have learned to respect the rights of the Sámi people.'*<sup>86</sup> That is quite a broad indicator, and it might be criticised for not being particularly easy to measure. However, one has to make indicators based on the law, and those indicators must be as legally relevant as possible. In relation to attitude indicators (as in the example) one could construct an additive index (a Likert scale) based on the responses from number of different questions. One might try to set a benchmark in relation to that index.<sup>87</sup> One of the questions could be formulated approximately like this in relation to the example indicator: *'On a scale from 1-10 how much do you agree with this statement: The Sámi people are too demanding in their fight for rights.'*<sup>88</sup> Adding up the score from different similar statements could give an overall score on the indicator (*Pupils in ninth grade must have learned to respect the rights of the Sámi people*). But then again, where should the benchmark be set? What score must be attained in order to say that *pupils in ninth grade have learned enough respect for the rights of the Sámi people*? What score must be attained in order to say that the CRC article 29 (1) (b) has been fulfilled? If we say (as in the example) that 1 represents positive attitudes towards Sámi rights and 10 represents negative attitudes one might, for example, say that the minimum average score must at least be 5.

### 5.5 'Should' and 'Must' Assessments

One should, as a general rule, try to be as careful as possible in undertaking legal analysis.<sup>89</sup> However, it is hard to stick to rock-solid legal conclusions in all aspects of the law when making indicators. Sometimes one can make a case that a State *"should"* meet the standards reflected in an indicator or benchmark, but one cannot say that the State *"must"* meet them. If one can justify the indicator by strong conclusive legal arguments, one can make a *"must-indicator"*. For instance, based on CRC article 29 (1), one could say that *"the majority of 9<sup>th</sup> grade students must be able to read and write"*.

If, for example, a UN treaty body has expressed an opinion once or twice in concluding observations or in general comments, one can make a *"should-indicator"* based on that opinion, but one cannot say that a State is legally bound it, because the statements of the UN treaty bodies are not legally binding.<sup>90</sup>

The same goes for benchmarks. When setting the benchmarks, based on the indicators, one should be even more careful because they are drafted at the third

operationalisation level, after the questions.<sup>91</sup> Thus, the benchmarks should sometimes be formulated as “*should-benchmarks*” in relation to “*must-indicators*”.

## 6. Summary Steps to Reach a High Score on Legal Relevance

So to sum up, which steps are necessary to maintain legal relevance (validity) in socio-legal studies about the quantitative realisation of human rights? Todd Landman proposed four levels for bridging the gap between the concept of human rights and indicators.<sup>92</sup> These are:

- (1) Background concept: the broad constellation of meanings and understandings associated with a given concept.
- (2) Systematized concept: a process of specifying specific right.
- (3) Operationalising the indicators: where decisions are made as to what type of measure that is to be used, and how this measure captures “the positive and negative dimensions” of the rights that it measures
- (4) Scores on indicators: the scores for units of observations (e.g. individuals, countries, regions) generated by a particular indicator – quantitative and qualitative data.

I agree somewhat with the basic order that Landman sketches. However, Landman did not elaborate on these levels, and he did not seem to be concerned about human rights as law – at least, not from a positivist legal perspective.<sup>93</sup>

I would suggest the following 10 steps for looking at the whole picture of conducting a survey on the realization (outcome) of a human rights law in a country:

- (1) General analysis of the law
- (2) Clarifying the judiciability of provisions:
- (3) Focus analysis
- (4) Clarifying the legal weight of the legal sources used in the analysis
- (5) Drafting (operationalising) indicators

- (6) Drafting questions
- (7) Doing a pilot survey
- (8) Drafting benchmarks
- (9) Collecting the data
- (10) Analysing the data and make conclusions in relation to the benchmarks.

### ***6.1 General Analysis of the Law***

First, one needs to get an overview of the legal landscape that one wants to study. That might include what Landman talked about in his first level (background concept). Even if one has decided to focus on one specific human rights provision, it is important to view that provision in the context of the other laws that are part of the convention and other relevant provisions in other conventions and declarations.

### ***6.2 Clarifying the Judiciability of Provisions***

Which of the provisions in the legal landscape are self-executing, and legally valid and enforceable laws? Some human rights provision is too expansive to be judicial; for instance, CESCR article 12 on “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” In general, it would be difficult to claim that a State has violated CESCR article 12 if you became sick. The provision is formulated more as a political aspiration than an enforceable law, which could be legally valid in court. Malcolm Langford discusses these expansive provisions in his dissertation on social rights (pp. 128-132).<sup>94</sup> So why clarify the judiciability of a human rights provision? Because if the provision is not enforceable in court, it has no legal significance. One might then criticize the lawmakers (parliament) for their lack of action in clarifying and consolidating their commitment, but it is meaningless to conduct a time-consuming socio-legal study on the realisation of such a provision, when in fact it is not a legally valid law. In order to achieve a high score on legal relevance, one must make sure that one is actually studying the law, and not something else.

### **6.3 Focus Analysis**

After the more general analysis of the legal landscape, one must choose to focus the legal analysis on one or two provisions, choosing a target group (sampling) and defining the geographical scope of the study. This may be compared to the second level referred to by Landman (systematized concept) (however, I would add that one must start thinking about sampling the target group and the geography of the survey to this concept). The legal analysis, at this stage, is about clarifying what the rights/law mean in practice for specific individuals and groups that are the subjects for the study. Why do I say that one should focus on one or two provisions, and not a whole convention? Because if one is interested in a high score on legal relevance, one must have space to conduct a diligent and detailed analysis of the law. This stage lays the legal foundation for the drafting of indicators, questions and benchmarks. If the legal analysis is shallow, it will weaken the legal relevance of the indicators, questions and benchmarks.

### **6.4 The Legal Weight of the Legal Sources**

What is the legal weight and legal validity of the legal sources used in the analysis of the law? For instance, general comments are not legally binding; however, if the Supreme Court has endorsed them as weighty legal documents, and if the treaty-body has repeated the same argument many times in concluding observations and other general comments, and if other committees and declarations supported those general comment one might argue that it is a weighty legal source. An explanation of legal sources in general might be conducted in a separate chapter; however, one must also justify and explain the use of legal sources as part of the legal analysis, especially when one comes to the assessment of the legal weight of the indicators, questions and benchmarks.

### **6.5 Drafting (operationalising) Indicators**

Based on the focus analysis (step 3) one starts to operationalise (translate) the legal conclusions into specific, measurable and target specific indicators. One thing is to consider the different aspects of a provision in relation to a target group within a geographically defined area, but at this stage one must gather the perspectives and arrive at some conclusions about what to measure. It is like writing a judgment. After having presented the perspectives of each of the parties, the judge addresses all the necessary and relevant questions in the case, making conclusions along the way, and then the conclusions are

summed up and clarified. What must be there for the law to be fulfilled or enjoyed for the target group? One should take care to make the indicators as measurable as possible, at the same time one must regard the indicators as legal conclusions, meaning that each indicator must be justified by strong legal arguments.

As the indicators are legal conclusions, one should justify each indicator with legal arguments. Not all legal conclusions can be rock-solid and immune to criticism. Thus, to discuss and be open about the weaknesses and strengths of each of the indicators is important to maintain a high score on legal relevance. Thus, one should assess the legal relevance and legal weight of the indicators.<sup>95</sup>

### **6.6 Drafting Questions**

Having drafted the indicators, one can then start to draft questions. The questions must be relevant (valid) in relation to the indicators, but to maintain legal rigour one should, as mentioned, keep an eye on the legal analysis of the law and not just rely on the indicator.<sup>96</sup> Some questions are going to have a stronger legal relevance than others do. In order to increase transparency and a high score on legal relevance, one should clarify and discuss the legal relevance and legal weight of each question, or at least some of the questions or groups of questions.<sup>97</sup>

### **6.7 Pilot Survey**

Different people, age groups and cultures understand words differently. Formulations may seem logical in one's own head, but others might understand them differently. Some questions might also be seen as inappropriate. There are so many ways of getting it wrong. To conduct a pilot survey and to do some interviews to find out how the survey has been understood is thus very important.

### **6.8 Drafting Benchmarks**

Having finished drafting indicators and questions, one can then start drafting benchmarks, and not before. The benchmarks must be based on the data one can expect from the questions. What should be the minimum score/result on the indicators and questions to indicate that a State has fulfilled its obligations? Again, as mentioned, to increase transparency and a high score on legal relevance, one should clarify and discuss the legal

relevance and legal weight of each benchmark. I find this to be very difficult, because at this stage, the text of the law is operationalised (translated) for the third time.<sup>98</sup>

### ***6.9 Collecting the Data***

There are numerous articles and books on how to conduct surveys; hence, I will not go into such issues. As a general rule, one should try to make sure that the data-collection process is as reliable as possible, and one must try to get a response rate that is as high as possible.

### ***6.10 Analysing the Data***

A general approach in quantitative research is to analyse the strength of the findings via conducting statistical analyses (and there are numerous books on this approach). However, in a socio-legal study on the realisation of the law, the primary aim is to find out if the law has been fulfilled. Have the conduct the government reaped the necessary results? Have the obligation of results been met? If one have managed to draft benchmarks (that are legally relevant) the analysis of the results can be compared and discussed in relation to these benchmarks. If one has not managed to draft any benchmarks, one can discuss the results in relation to the law more generally, perhaps without drawing any conclusions about violations of the law. Even if it is not possible to determine if the law has been violated, the data can give important information about the realisation of the law. This is especially true for studies on human rights laws, in which the violation of the law is determined on a case-to-case basis.

### ***6.11 General Reflections on the Steps***

The scope of this article does not permit me to go into detail about all these steps. In reality, one will jump a little bit back and forth between them. For instance, as one starts to draft the indicators, or the questions, one might realise that the legal analysis needs to be adjusted. The same thing might happen after having conducted a pilot survey. However, although one might go back and adjust certain parts, one should follow the basic order, and not (for example) start drafting benchmarks before the law has been analysed, and the indicators have been drafted.



## 7. Concluding Summary Remarks

I began this paper by contemplating the following primary research question: *How do we ensure a high score on legal relevance (validity) in quantitative studies on the realisation (outcome) of human rights law?*

In addressing this question, I presented a review of the literature on the sociology of law, mostly from a Scandinavian perspective because that is what I know best. There seems to be a lack of general theories on how to study the effects of laws. One of those who have developed general theories on this is Sidsel Sverdrup.<sup>99</sup> She sketched out different models for evaluating laws. The most relevant model for answering my research question is the target group model. However, she did not contemplate a theory on how to ensure legal relevance in surveys. Todd Landman and Edzia Carvalho (2010) had a similar model, talking about survey-based models.<sup>100</sup> They also included the use of indicators as a tool to develop surveys.

I used the concept “legal relevance” instead of validity, because the concept “legal validity” has a very different meaning within law. It refers to the enforceability of a law. Todd Landman and Edzia Carvalho (2010) did refer to the importance of ensuring validity in indicators; however, they did not really develop any theory on how to ensure that the indicators are legally relevant. Todd Landman seemed to be adopting a natural law perspective on human rights.<sup>101</sup> I rejected that, and argued instead for the importance of adopting a legal positivist approach to the law.

I then argued that in order for indicators to function as legally relevant tools for the development of surveys, they must be regarded as *legal conclusions about what to measure in order to say that a legal right is fulfilled in a given context*. Then the legal analysis behind the operationalisation of the indicators should be transparent and open to criticism. For the sake of diligence, the legal weight and strength of the legal arguments should be discussed. Sadly, most of the studies, reports and literature on indicators have not justified the indicators with legal arguments. This is also a question of the legitimacy of power and rule of law. Indicators might take normative life of their own, reshaping its parent law, and thus undermining the law.

Survey questions are operationalised based on the indicators. However, for the sake of diligence, one should keep an eye on the legal analysis behind the indicators. Some questions are going to be more legally relevant than other questions. Thus, the most diligent

students would discuss the legal justification for each question, or at least groups of questions.

Having constructed questions, one can then start to develop (operationalise) benchmarks. They are the minimum scores/results on the indicators to be attained in order to determine whether a State has fulfilled its commitments. As for indicators and questions, the legal justifications behind benchmarks must be justified and discussed. In doing so, one must address the issue of minimum core rights. At this level, the law is operationalised for the third time, making it a very difficult legal task.

Lastly, I take a step back sketching a picture of the whole study, based on my primary research question. I suggest 10 steps, starting with a general analysis of the law and ending with the analysis of the data in relation to the benchmarks.

In this paper, I have focused strictly on the question of legal relevance in the foggy woods in-between law and sociology. To ensure validity and reliability in general from a sociological perspective, once the law has been operationalised, one can read a plethora of books on sociological methodology.

To sum up in the simplest of terms: indicators, questions and benchmarks are legal conclusions. They should be diligently justified by legal arguments every step of the way. The legal strength and weight of the indicators, questions and benchmarks should also be determined and discussed. It becomes more difficult at each level of operationalisation along the way, as one moves further and further away from the text of the law. The indicators, questions and the benchmarks should reflect that uncertainty. Sometimes one can say that a State “should” achieve a certain level of result in a survey (a should-benchmark), but one cannot make the argument that if the results fall below that level the State has, as an indisputable fact, failed to fulfil the convention (a must-benchmark).

## **8. Endnotes**

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<sup>1</sup> Martin Luther King, *Where Do We Go from Here: Chaos or community* (1968 Beacon Press) 87.

<sup>2</sup> For the father of the concept “Living Law”, see: Eugen Ehrlich, *Fundamental Principles of Sociology of Law* (first published 1936, Transaction Publishers 2009).

<sup>3</sup> The Committee on Economic, Social and Cultural Rights (CtESCR) ‘General Comment No. 13 The right to education (article 13 of the Covenant)’ UN doc. E/C.12/1999/10 (1999), para 52; CtESCR ‘General Comment No. 14 The right to the highest attainable standard of health’ UN doc. E/C.12/2000/4 (2000), para 52; CtESCR ‘General Comment No. 15 The right to water’ UN doc. E/C.12/2002/11 (2002), para 54; CtESCR ‘General Comment No. 16 The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3)’ UN Doc. E/C.12/2005/4 (2005), para 39; CtESCR ‘General Comment No. 17’ UN Doc. E/C.12/GC/17 (2006) paras 49-50; and CtESCR ‘General Comment No. 18: Article 6’, UN Doc. E/C.12/GC/18 (2006), paras 46-47.

<sup>4</sup> See for instance: Committee on the Rights of the Child (CtRC) General Comment No. 5 General Measures of Implementation of the Convention on the Rights of the Child, UN doc. CRC/GC/2003/5 (2003), paras 48-50; CtRC General Comment No. 7 Implementing child rights in early childhood, UN doc. CRC/C/GC/7/Rev.1 (2006), para 39; CtRC General Comment No. 9 The rights of children with disabilities, UN doc. CRC/C/GC/9 (2006), para 18; CtRC General Comment No. 11 Indigenous children and their rights under the Convention, UN doc. CRC/C/GC/11(2009), paras 26, 34 and 80; CtRC General Comment No. 13 The right of the child to freedom from all forms of violence, UN Doc. CRC/C/GC/13 (2011); CtRC General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), UN Doc. CRC/C/GC/15; and CtRC General Comment No. 17 on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art. 31) UN doc. CRC/C/GC/17 (2013).

<sup>5</sup> For a discussion on these and other standards see: Ann J. Rosga and Margaret L. Satterthwaite, ‘The Trust in Indicators: Measuring Human Rights’ (2009) Vol.27/2 Berkley Journal of International Law, 23-27.

<sup>6</sup> Hans Otto Sano and Hatla Thelle, ‘The Need for Evidence-Based Human Rights Research’ in Fons Coomans, Fred Grünfeld and Menno T. Kamminga (ed) *Methods of Human Rights Research* (2009 Intersentia) 96.

<sup>7</sup> They define quantitative data as follows: “Data created and/or collected by researchers, primary evidence. This category includes a number of sub-categories such as surveys, e.g. quantitative household or individual data, perception surveys, i.e. surveys soliciting perceptions by the informants, expert based quantitative assessments, i.e. experts assessing e.g. numbers or levels of human rights violations, and quantitative organizations data, for instance lists or registrations of numbers of e.g. prisoners, collected by government or private organizations.” (Ibid, 96)

<sup>8</sup> Qualitative data was defined as follows: “Evidence collected by researchers as part of qualitative interviews or of anthropological observation. Event based data: descriptive and quantitative recoding of events and situations often undertaken by human rights organizations in connection with atrocities and systematic or gross human rights violations.” (Ibid)

<sup>9</sup> Fons Coomans, Fred Grünfeld and Menno T. Kamminga, ‘Methods of Human Rights Research: A Primer’ (2010) Vol. 32 no.1 2010 Human Rights Quarterly, 183.

<sup>10</sup> See, below: 5. Indicators, questions and benchmarks

<sup>11</sup> For more on the obligations of results, see: Matthew C. R. Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (Clarendon Press 1995).

<sup>12</sup> Hadi K. Lile, ‘FNs barnekonvensjon artikkel 29 (1) om formålet med opplæring: En rettssosiologisk studie om hva barn lærer om det samiske folk’ (PhD: Faculty of Law, University of Oslo 2011)

<sup>13</sup> Thomas Mathiesen, *Retten i samfunnet: En innføring i rettssosiologi* (6th edn, Pax Forlag 2011), 25.

<sup>14</sup> Mathieu Deflem, *Sociology of Law: Visions of a Scholarly Tradition* (Cambridge University Press 2008), 3

<sup>15</sup> Håkan Hyden, *Rättssociologi som rättsvetenskap* (Studentlitteratur 2002)

<sup>16</sup> Reza Banakar, ‘A Passage to “India”: Toward a Transformative Interdisciplinary Discourse on Law and Society’ (2001) Vol. 92/2001 Retfærd 3; Reza Banakar ‘The Identity Crisis of a Stepchild – Reflections on the Paradigmatic Deficiencies of Sociology of Law’ (1998) Vol. 81/1998 Retfærd 3.

<sup>17</sup> Kristian Andenæs, *Sosialomsorg i gode og onde dager* (Tano 1992), p. 77; Hadi K. Lile ‘FNs barnekonvensjon artikkel 29 (1) om formålet med opplæring: En rettssosiologisk studie om hva barn lærer om det samiske folk’ (PhD thesis Faculty of Law, University of Oslo 2011), 33-41.

<sup>18</sup> Vilhelm Aubert, Torstein Eckhoff and Knut Sveri, *En lov i søkelyset: Sosialpsykologiske undersøkelser av den norske hushjelp* (Universitetsforlaget 1952).

<sup>19</sup> Ibid, 5

<sup>20</sup> For example: Tone Sverdrup, ‘Mellom ekteskapskontrakt og lønnskontrakt’ (Report from Nordisk forskerkurs i kvinneverett, Skrift nr. 3, University of Oslo 1982); Tone Sverdrup, ‘Lovvern for arbeidstagere i private hjem’ (Kvinneverettslig arbeidsnotat nr. 31, University of Oslo 1984). Leif E. Moland, ‘Ingen grenser?’

- Arbeidsmiljø og tjenesteorganisering i kommunene' (Report 221, Fafo1997); Jon Anders Hasle 'Sist inn – først ut? Om etterlevelse av arbeidsmiljølovens oppsigelsesvernregler overfor innvandrere' (Særavhandling, University of Oslo 1995); Morten Kjelland, *Hjemmearbeideres erstatningsrettslige vern* (Gyldendal Akademisk 2002); Annika Pfannenstill, *Rättsociologiska studier inom området autism: Rättsanvändningen i en kunskapskonkurrerande miljö* (Lund Studies in Sociology of Law 2002); and Marianne Smith and Marianne Glærum, 'Avhendingsloven – til hjelp eller besvær? En studie av boligkjøperes kjennskap til avhendingsloven og deres adferd under kjøpeprosessen' (Skriftserie nr. 60, Institutt for retts sosiologi, University of Oslo1998).
- <sup>21</sup> Vilhelm Aubert, Torstein Eckhoff and Knut Sveri, *En lov i søkelyset: Sosialpsykologiske undersøkelser av den norske hushjelplov* (Universitetsforlaget 1952), 51.
- <sup>22</sup> Ibid.
- <sup>23</sup> Ibid 51 and 55.
- <sup>24</sup> Jørgen Dalberg-Larsen, *Loven og livet: en rettsociologisk grundbog* (Jurist- og Økonomiforbundets Forlag 2005), 44.
- <sup>25</sup> This is my free translation from Norwegian: Gustav Haraldsen, *Spørreskjemametodikk: etter kokebokmetoden* (Gyldendal 1999) p. 24.
- <sup>26</sup> Sidsel M. Sverdrup, 'Evaluerer av lovers tilskattede virkninger: En case-studie av markedsføringsloven' (PhD, Faculty of Social Science, University of Oslo 1997), 144-176.
- <sup>27</sup> Sidsel M. Sverdrup, *Evaluerer: Tilnærminger, modeller og eksempler*. (Gyldendal 2014), 98-115.
- <sup>28</sup> See above footnote 27
- <sup>29</sup> Ibid, 105-106.
- <sup>30</sup> Sidsel M. Sverdrup, *Evaluerer: Tilnærminger, modeller og eksempler*. (Gyldendal 2014), 103-105.
- <sup>31</sup> See above: 1.2 Human Rights focus
- <sup>32</sup> For more on triangulation, see: Frieder Wolf, 'Enlightened Eclecticism or Hazardous Hotchpotch? Mixed Methods and Triangulation Strategies in Comparative Public Policy Research' (2010) Journal of Mixed Methods Research 2010 Vol. 4 nr. 2
- <sup>33</sup> Michael Evans, 'Reliability and Validity in Qualitative Research by Teacher Researchers' in Elaine Wilson (ed) *School-based Research: A guide for education students* (SAGE Publication 2009) 120.
- <sup>34</sup> Todd Landman and Edzia Carvalho, *Measuring Human Rights*. (Routledge 2010), 45-127.
- <sup>35</sup> Ibid, ch. 6.
- <sup>36</sup> Ibid, 91.
- <sup>37</sup> Here are for example some references to studies done in Norway on legal aid: Ståle Eskeland and Just Finne, *Retts hjelp* (Pax forlag 1973); Ståle Ekseland and Just Finne, 'Allmenhetens behov for retts hjelp' (1973) Vol. 4 Jussens Venner; Jon T. Johnsen, 'Retts hjelpbehovet – dets omfang og årsaker' (Rapport fra retts hjelpseminaret 1979); Jon T. Johnsen, *Retten til juridisk bistand. En retts politisk studie* (Tano 1987); Merethe S. Haugen and Elisabeth Vigerust, 'Det udekkede behov for retts hjelp – et uløst problem' (Særavhandling at the Law Faculty, University of Oslo 1992); Hans Petter Graver, Ane Broch et. al. 'Retts hjelp 2001. Behovet for retts hjelp i Oslos befolkning – deriblant et utvalg innvandrerkvinner' (Juss-Buss in cooperation with Unipub 2002).
- <sup>38</sup> Ibid, 76-78.
- <sup>39</sup> David Cingranelli, and David L. Richards 'Quantitative Studies' in David P. Forsythe (ed) *Encyclopedia of Human Rights* ( Oxford University Press 2009), 3.
- <sup>40</sup> Joseph Raz, *The authority of law: Essays on law and morality* (Clarendon Press 1979), ch 8.
- <sup>41</sup> Kevin E Davis, B Kingsbury and SE Merry (ed) *Governance by Indicators: Global Power through Classification and Rankings* (Oxford University Press 2012), 9-10.
- <sup>42</sup> Terence C. Halliday, 'Legal Yardsticks: International Financial Institutions as Diagnosticians and Designers of the Laws of Nations' In Kevin E Davis, B Kingsbury and SE Merry (ed) *Governance by Indicators: Global Power through Classification and Rankings* (Oxford University Press 2012), 180-181.
- <sup>43</sup> Ibid, 181.
- <sup>44</sup> They use the term "construct validity", but it means the same thing as discussed above – legal relevance.
- <sup>45</sup> Malcolm Langford and Sakiko Fukuda-Parr, 'The Turn To Metrics' (2012) Vol. 30:3 Nordic Journal of Human Right 222, 232.
- <sup>46</sup> Todd Landman and Edzia Carvalho *Measuring Human Rights* (Routledge 2010), 97-98.
- <sup>47</sup> See above: 3.1 Evaluation models
- <sup>48</sup> Ibid, 9-31.

- <sup>49</sup> Todd Landman, *Studying Human Rights* (Routledge 2006); Todd Landman and Edzia Carvalho, *Measuring Human Rights* (Routledge 2010), 80.
- <sup>50</sup> Eugene Ehrlich, *Fundamental Principles of the Sociology of Law*, trans. WL Moss (Harvard University Press 1936), 493.
- <sup>51</sup> David Nelken, 'Law in Action or Living Law? Back to the Beginning of Sociology of Law' (1984) Vol. 4.2 Legal Studies, 157-174. See also: Håkan Hydén, *Normvetenskap* (Lund Studies in Sociology of Law, Lund University 2002).
- <sup>52</sup> Gordon W. Allport, *The Nature of Prejudice* (first published by Perseus Books Publisher 1988) in Charles Stangor, *Stereotypes and Prejudice* (Psychology Press 2000) 27.
- <sup>53</sup> Hans-Georg Gadamer, *Truth and Method*, translated by Joel Weinsheimer and Donald G. Marshall (first published 1960, Continuum 1998) 276.
- <sup>54</sup> Immanuel Kant, *Groundworks of the Metaphysics of Morals*, translated and edited by Mary Gregor and Christine M. Korsgaard (first published 1785, Cambridge University Press 1997), 20.
- <sup>55</sup> There is absolutely no room in this article to dive into this comprehensive debate. For a good overview of the debate see: Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory*, third edition (Oxford University Press 2005), 10-118.
- <sup>56</sup> The first to write about the *State of Nature* was: Thomas Hobbes, *Leviathan* (first published 1651, Penguin 1985)
- <sup>57</sup> D. Dyzenhaus, 'Positivism's Stagnant Research Programme' (2000) Vol. 20/4 Oxford Journal of Legal Studies, 719: "Legal positivist today form by far the biggest camp within legal theory". Steven Ratner & Anne-Marie Slaughter, 'Appraising the Methods of International Law' (93 Am. J. Int'l L. 291) 293: "It remains the lingua franca of most international lawyers". Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 2nd ed., 1978) vii. Jean d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rights* (Oxford University Press 2013) 20.
- <sup>58</sup> Maria Green, 'What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement' (2001) Vol. 23.4 Human Rights Quarterly 1062, 1065.
- <sup>59</sup> The term human rights indicator is often used as a tool to measure if a human rights project (funded by some donor) have reached its aims.
- <sup>60</sup> For more on the concept of "legal relevance" and validity, see paragraph 6 below.
- <sup>61</sup> Malcolm Langford, 'Social Rights Adjudication: An Interdisciplinary Perspective' (PhD, Faculty of Law, University of Oslo 2014); Martin Scheinin 'Economic and Social Rights as Legal Rights' in Asbjørn Eide, Catarina Krause and Allan Rosas (ed) *Economic, Social and Cultural Rights: A Textbook*. (2nd edn. Martinus Nijhoff 2001), 29-54.
- <sup>62</sup> Paul Hunt, 'Interim report of the Special Rapporteur of the Commission on Human Rights on the right of everyone to enjoy the highest attainable standard of physical and mental health' (2003) A/58/427.
- <sup>63</sup> OHCHR 'Report on Indicators for Promoting and Monitoring the Implementation of Human Rights' (2008) HRI/MC/2008/3; OHCHR 'Human Rights Indicators: A Guide to Measurement and Implementation' (2012) HR/PUB/12/5.
- <sup>64</sup> Ibid.
- <sup>65</sup> Principles relating to the Status of National Institutions (The Paris Principles). Adopted by The General Assembly resolution 48/134 of 20 December 1993.
- <sup>66</sup> OHCHR 'Report on Indicators for Promoting and Monitoring the Implementation of Human Rights' (2008) HRI/MC/2008/3, para.19.
- <sup>67</sup> See above footnote 63.
- <sup>68</sup> Hadi K. Lile, 'FNs barnekonvensjon artikkel 29 (1) om formålet med opplæring: En rettsoslogisk studie om hva barn lærer om det samiske folk' (PhD: Faculty of Law, University of Oslo 2011), 71-73.
- <sup>69</sup> Erik A. Andersen, and Hans-Otto Sano *Human Rights Indicators at Programme and Project Level: Guidelines for Defining Indicators, Monitoring and Evaluation*. (Danish Institute for Human Rights 2006), 13-17.
- <sup>70</sup> See above: 3.1 Evaluation models
- <sup>71</sup> OHCHR 'Report on Indicators for Promoting and Monitoring the Implementation of Human Rights' (2008) HRI/MC/2008/3; OHCHR 'Human Rights Indicators: A Guide to Measurement and Implementation' (2012) HR/PUB/12/5.
- <sup>72</sup> Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child* (UNICEF 2007)

- <sup>73</sup> Katarina Tomasevski 'Indicators' in Asbjørn Eide, Catarina Kraus and Allan Rosas (ed) *Economic, Social and Cultural Rights: A textbook*. (2<sup>nd</sup> edn Kluwer Law International 2001), 532.
- <sup>74</sup> Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child* (UNICEF 2007)
- <sup>75</sup> OHCHR 'Report on Indicators for Promoting and Monitoring the Implementation of Human Rights' (2008) HRI/MC/2008/3; OHCHR 'Human Rights Indicators: A Guide to Measurement and Implementation' (2012) HR/PUB/12/5.
- <sup>76</sup> See above: 5. *Indicators, Questions and Benchmarks*
- <sup>77</sup> Terence C. Halliday 'Legal Yardsticks: International Financial Institutions as Diagnosticians and Designers of the Laws of Nations' in Kevin E. Davis, B. Kingsbury and S.E. Merry (ed) *Governance by Indicators: Global Power through Classification and Rankings* (Oxford University Press 2012), 80-181.
- <sup>78</sup> Ottar Hellevik, *Forskningsmetode i sosiologi og statsvitenskap* (Universitetsforlaget 2009), 17
- <sup>79</sup> Sidsel M. Sverdrup, *Evaluering: Tilnærminger, modeller og eksempler*. (Gyldendal 2014), 105-106.
- <sup>80</sup> See above footnote 3 and 4.
- <sup>81</sup> CtESCR 'Canada: Sixth periodic report' (23 April 2013) E/C.12/CAN/6
- <sup>82</sup> Jon Christian Nordrum discusses some of these problems: Jon Christian Fløysvik Nordrum 'Evaluering av lover' in Anne Halvorsen, Einar L. Madsen and Nina Jentoft (ed) *Evaluering: Tradisjoner, praksis, mangfold* (Fagbokforlaget 2013), 994-95.
- <sup>83</sup> For more on minimum core rights, see for instance: Malcolm Langford, *Social Rights Adjudication: An Interdisciplinary Perspective*. (PhD, Faculty of Law University of Oslo 2014), 132-134 and Katharine Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) Vol. 33.1 Yale Journal of International Law 113-175.
- <sup>84</sup> CtESCR 'General Comment No. 19 The right to social security (art. 9)' UN Doc E/C.12/GC/19 (2008), para 76; CtESCR 'General Comment No. 18: Article 6', UN Doc. E/C.12/GC/18 (2006), para 47. CtESCR 'General Comment No. 17' UN Doc. E/C.12/GC/17 (2006) paras 50. CtESCR 'General Comment No. 15 The right to water' UN doc. E/C.12/2002/11 (2002), para 54. CtESCR 'General Comment No. 14 The right to the highest attainable standard of health' UN doc. E/C.12/2000/4 (2000), para 58.
- <sup>85</sup> Thomas Risse, Stephen C. Ropp and Kathryn Sikkink, *The Power of Human Rights International Norms and Domestic Change* (Cambridge University Press 1999).
- <sup>86</sup> This is based on an interpretation of CRC article 29 (1) (b) in relation to education about Sámi people in Norway. See: Hadi K. Lile, 'FNs barnekonvensjon artikkel 29 (1) om formålet med opplæring: En retts sosiologisk studie om hva barn lærer om det samiske folk' (PhD: Faculty of Law, University of Oslo 2011), 113-164.
- <sup>87</sup> For more on additive indexes and the Likert-scales, see: Ottar Hellevik, *Forskningsmetode i sosiologi og statsvitenskap* (Universitetsforlaget 2009), 157-169.
- <sup>88</sup> For more on the measurement of attitudes: John B. McConahay, Betty B. Hardee og Valerie Batts 'Has Racism Declined in America?: It Depends on Who is Asking and What is Asked' (Vol. 25 Journal of Conflict Resolution 1981) 568.
- <sup>89</sup> See also above: 4.1 *What is Human Rights Law?*
- <sup>90</sup> Having said that, statements from the committees can develop international customary law and be an expression of that. If one can refer to a range of statements about the same thing many times, without any objections from states, one might argue that this interpretation from the committee is legally binding.
- <sup>91</sup> See above: 5.4 *Benchmarks*
- <sup>92</sup> Todd Landman, *Studying Human Rights* (Routledge 2006); Todd Landman and Edzia Carvalho, *Measuring Human Rights* (Routledge 2010), 76-78.
- <sup>93</sup> See above: 4.1 *What is human rights law?*
- <sup>94</sup> Malcolm Langford 'Social Rights Adjudication: An Interdisciplinary Perspective' (PhD, Faculty of Law, University of Oslo 2014), 128-132; Martin Scheinin 'Economic and Social Rights as Legal Rights' in Asbjørn Eide, Catarina Kraus and Allan Rosas (ed.) *Economic, Social and Cultural Rights: A Textbook* (2<sup>nd</sup> edn Martinus Nijhoff Publishers 2001), pp. 29-54.
- <sup>95</sup> See above: 5.5 *Should and must assessments*
- <sup>96</sup> See above: 5.3 *Survey Questions*
- <sup>97</sup> Ibid.
- <sup>98</sup> See above: 5.4 *Benchmarks*

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<sup>99</sup> Sidsel M. Sverdrup, *Evaluering: Tilnærminger, modeller og eksempler*. (Gyldendal 2014), 103-105.

<sup>100</sup> Todd Landman and Edzia Carvalho, *Measuring Human Rights*. (Routledge 2010), 45-127.

<sup>101</sup> Todd Landman, *Studying Human Rights* (Routledge 2006); Todd Landman and Edzia Carvalho, *Measuring Human Rights* (Routledge 2010), 80.